Supreme Court, U.S.

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No.____ OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1997

JOHN MICHAEL CERCEO; U. S. ROUTE 29, MADISON PROJECT, INCORPORATED,

Petitioners,

v.

WILLIAM E. SHMIDHEISER, III,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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28 pp

QUESTIONS PRESENTED

1. Creditor bank purchased a deed of trust and note which was in default when purchased. The bank subsequently filed an adversary action against the property owner (Petitioner-debtor) on another matter. The bank then, without notice to the debtor, appointed their counsel (William E. Shmidheiser, III-Respondent) in the adversary matter as sole trustee to sell the debtor's property and collect the note. Because of the other adversary action, the debtor, and the trustee were precluded from communicating with each other on the sale of the debtor's property.

Petitioner asserts that as a result the property was sold at a fraction of it's value. The sale price failed to pay out the note thus causing the debtor to incur a deficiency law suit by the same bank, using the same counsel.

Is this a conflict with Virginia Common law which asserts that the trustee is an agent of both parties, and is bound to act impartially between them?

2. The Court below had ruled previously in a similar but unrelated case, that trustee conflict of interest is a defense in recoupment under Virginia law, but in this case did not reach the same conclusion. Should the Court below have ruled in conformance with the prior decision?

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PETITION FOR WRIT OF CERTIORARI

John Michael Cerceo; U.S. Route 29, Madison Project, Incorporated[1], (Petitioners), respectfully prays that a writ of certiorari issue to review the judgement and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on June 10 1997.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit that gives rise to this petition is unpublished by order of the Fourth Circuit. It is reprinted in Appendix A hereto (App. A) at pages App-1 to App-11. By order filed July 9 1997, the Fourth Circuit denied the petition for rehearing and suggestion for rehearing in banc which was timely filed. App. B, pages App-12 and App-13.

JURISDICTION

The judgement of the United States Court of Appeals for the Fourth Circuit ("Court of Appeals") was entered on June 10 1997. The Court of Appeals denied a timely petition for rehearing and suggestion for rehearing in banc on July 9 1997 .

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

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[1]No parent or subsidiaries

STATUTES INVOLVED IN THIS CASE

Va. Code Ann. §8.3A-302. Holder in due course.

(c) Except to the extent a transferor or predecessor in interest has rights as a holder in due course, a person does not acquire rights of a holder in due course of an instrument taken (i) by legal process or by purchase in an execution, bankruptcy, or creditor's sale or similar proceeding, (ii) by purchase as a part of a bulk transaction not in ordinary course of business of the transferor, or (iii) as the successor in interest to an estate or other organization.

Va. Code Ann. §8.3A-305. Defenses and Claims in recoupment.

(a) Except as stated in subsection (b), the right to enforce the obligation of a party to pay an instrument is subject to the following:

(2) a defense of the obligor stated in another section of this title or a defense of the obligor that would be available if the person entitled to enforce the instrument were enforcing a right to payment under a simple contract[2]; and...

Va. Code Ann. § 26-58. Trustee who is a corporate stockholder or counsel to noteholder not disqualified.

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[2] A holder , not a holder in due course, has only the rights of a simple contract as to the instrument, and is subject to all defenses against a simple contract in an action for recoupment.

The mere fact that a trustee in a deed of trust to secure a debt due to a corporation is a stockholder, member, employee, officer or director of, or counsel to, the corporation, does not disqualify him from exercising the powers conferred by the trust deed nor does it render voidable a sale by such trustee in the exercise of the powers conferred on him by the trust deed so long as he did not participate in the corporation's decision as to the amount to be bid at the sale of the trust property. Moreover, if the lender secured by the deed of trust bids the amount secured, including interest through the date of sale and costs of foreclosure, the trustee's participation in fixing the bid price by the party secured shall not be deemed improper and such sale shall not be rendered voidable[3] solely by reason of his participation. All sales made before July 1, 1990, by such trustees by virtue of such deeds of trust, and all deeds made by such trustees in pursuance of such sales, shall be held, and the same are hereby declared to be, valid and effective in all respects, if otherwise valid according to laws then in force, the same as if such trustees had not been stockholders, members, employees, officers or directors of, or counsel to, the corporations thereby secured.

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[3]Voidable transactions. - Virginia law deems that a conflict of interest such as a breach of faith or fiduciary duty by officers of the trustee makes a transaction voidable by the plaintiff-debtor, not void, thus rendering that defense useless against a holder in due course. *Resolution Trust Corp. v. Maplewood Invs.*, 31 F.3d 1276 (4th Cir. 1994)

STATEMENT OF THE CASE

In 1991, the consulting firm started by petitioner Cerceo, in 1986, was forced out of business. Cerceo also had started a farm winery business in 1982 and a commercial real estate development corporation project in 1989, which was called U. S. Route 29 Madison Project, Inc. U. S. Route 29 is a co-petitioner in the petition before this court for a writ of certiorari.

The loss of the consulting firm deprived Cerceo of the cash flow to carry his real estate project and farm. In January 1992, Cerceo started to default on the loans for the U.S. Route 29 project, which were held by Dominion Bank, N. A. and subsequently on the operating loan on the farm held by Second Bank and Trust in Madison Virginia. Second Bank started foreclosure on the farm winery in July 1992, and Cerceo put the winery corporation into chapter 11 in August of 1992. In May of 1992, Cerceo had renegotiated the U.S. Route 29 loans with Dominion Bank, and had given that bank a lien on the farm winery inventory. Cerceo subsequently defaulted on the Dominion Bank loans. The defaulted Dominion Bank loans were subsequently bought by First Union Bank of Virginia sometime before August of 1992. After Cerceo filed a petition in Chapter 11 for the farm winery, respondent Shmidheiser was appointed counsel to represent the interests of First Union Bank in the bankruptcy of Misty Mountain, sometime after August 1992. Shmidheiser subsequently filed various adversary actions in the bankruptcy court, against Cerceo, who was debtor in possession of Misty Mountain.

While acting as adversary counsel for First Union Bank in adversary actions against Misty Mountain and Cerceo, Respondent Shmidheiser was subsequently appointed sole trustee in November 1994, by First Union Bank, for the purpose of foreclosure of Cerceo's commercial property held by U. S. Route 29 Madison

Project, Inc. Cerceo did not oppose the sale of the commercial property as he wanted the First Union Bank paid. Cerceo did negotiate with the bank how it would be sold through the services of a commercial real estate auction firm. This was necessary and prudent, as the community of Madison had a population of approximately 11,000 people and was a farming community without commercial real estate developers who would purchase the property for use as zoned. Cerceo feared that the property would bring only farm land price unless advertised out side the community. Shmidheiser, being adversary counsel for the bank against Cerceo in another matter, could not talk to Cerceo except through counsel for Cerceo on the bankruptcy matter. Cerceo was not represented by counsel on the foreclosure of his U. S. Route 29 commercial property, as he believed he did not need counsel because he had obtained agreement by First Union as to how the property would be sold.

Shmidheiser then made a unilateral decision not to sell Cerceo's commercial property as Cerceo thought had been agreed. Instead, Shmidheiser made the decision to sell the property himself and to advertise only in the local farm community newspaper and did not tell Cerceo of this decision. The result was a financial disaster for Cerceo, leaving him with an approximate $200,000 deficiency on the loan and a law suit against him, for the deficiency, by the same bank represented by Shmidheiser.

Cerceo, filed suit in circuit court of Madison County to overturn the sale, asserting that the price received for the commercial property of $250,000 was so low as to shock the conscience, on the basis that the property had been appraised at a price of $1,340,000 prior to the sale. Cerceo then put U. S. Route 29 into bankruptcy in the western district of Virginia and joined Shmidheiser as defendant in the deficiency suit filed by Shmidheiser for First Union bank in the Circuit Court of Madison County. The

case to overturn the sale of the property filed by Cerceo in circuit court of Madison Virginia, was transferred to the bankruptcy court.

The bankruptcy court found that Shmidheiser did not breach his fiduciary duty to Cerceo, that the advertising complied with Virginia Statute, §55-59.2A2 as to advertising and that the price of $250,000 amounting to 18% of Cerceo's appraisal was not so deficient as to shock the court's conscience.

Cerceo appealed to the district court, which affirmed the bankruptcy court, and Cerceo then appealed to the United States Court of Appeals for the 4th Circuit, which affirmed the district court in an unpublished opinion. (Appendix A, pages App-1 to App-11).

Cerceo, filed a timely petition with the court of appeals for a rehearing with a suggestion for a rehearing in banc and was denied on July 9 1997.(Appendix B, pages App-12 & App-13).

REASONS FOR GRANTING THE WRIT

I. Failure to follow common law of the State of Virginia.

Since the beginning of the 20th century the Virginia Courts have consistently ruled that trustee conflict of interest is a defense of the obligor in claims in recoupment. While Va Code Ann.§26-58. does not disqualify a trustee who is a corporate stockholder, employee of the creditor or counsel of the note holder, this section of the code does not remove the Virginia common law bar of; the... *"Trustee must not place himself directly or indirectly in position where his personal interest conflicts with interests of those for whom he acts". Whitlow v. Mountain Trust Bank*, 207 S.E. 2d837,

215 Va. 149 (August 1974). Shmidheiser, as counsel for the bank, which was suing Cerceo, was bound to act for the bank against the equitable interests of Cerceo. Thus a trustee who has any of the above relationships is not barred from acting as trustee, unless he is in a conflict of interest by accepting the trustee's role, as Shmidheiser found himself. Indeed the Virginia Courts have consistently ruled that the trustee in a deed of trust is the *agent* of both parties e.g. *Linney v. Normoyle*, 134 S. E. 554, 145 VA 589 (Sept. 1926). "***Duty of Trustees --Agent of Both parties.--****A trustee in a deed of trust is the agent of both parties, and bound to act impartially between them; nor ought he to permit the urgency of the creditors to force the sale under circumstances injurious to the debtor at an inadequate price," Linney, id.*

Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf ,..in re: Tarver, Steele & Co. v. Pendleton Gin Co., Tex. Civ. App., 25 S. W. 2d 156, 159. *.Or where one party is authorized to do certain acts for, or in relation to the rights or property of the other. But means more than tacit permission, in re: Klee v. U. S.* , C. C. A. Wash.,53 F2d 58, 61 It is clear that in order to be a trustee, who by Virginia law is an agent of both parties, Shmidheiser had to be able to communicate with Cerceo, and could not and did not so communicate. Because of his role of adversary counsel for First Union Bank ,in the Misty Mountain bankruptcy case, Shmidheiser was ethically barred from talking to Cerceo. Indeed Shmidheiser testified that this was the reason that he did not talk to Cerceo about his unilateral decision to change Cerceo's agreement with the bank as to advertising and other matters concerning the sale of Cerceo's commercial property.

In other words it was impossible for Shmidheiser to act as Cerceo's agent and become a trustee because he (Shmidheiser) was precluded from directly contacting Cerceo because of other legal

actions against Cerceo wherein Shmidheiser was opposing counsel.

Further, because he represented the creditor bank as plaintiff counsel in pending suits against Cerceo, who was the defendant in those matters, he could not act impartially between the two parties to the trust. Virginia Courts have consistently ruled that; *Because a trustee under a deed of trust is a fiduciary for both debtor and creditor, he must act impartially between them, Smith v. Credico Industrial loan Co.*, 362 S.E. 2d. 735, 234 Va. 514 (Nov. 1987)

Shmidheiser took undue advantage of Cerceo, by exercising his authority under the trust without discussing with Cerceo his plans to change the way the property was to be sold in violation of Cerceo's agreements with the bank. *In re Bresee v. Bradfield* [No Number in Original], Supreme Court of Virginia, 38 S. E. 196, 99 Va. 331 March 14 1901, *Chancery Practice--Bad faith, undue advantages taken, or oppression exercised, or undue influence exerted, coupled with inadequacy of price, will induce a court of equity to grant relief, defensive or affirmative.*

Shmidheiser also failed to act prudently in his advertising in violation of Virginia common law, in that he only advertised in a locale where there were no known buyers of the type of property to be sold. *In re Wilson v. Wall & Others*, [No Number In Original], Supreme Court of Virginia, 38 S. E., 181, 99 Va. 353 March 21 1901, *A trustee, in a deed to secure debts, is the agent of the debtor as well as the creditor, and it is his duty to act justly and impartially with respect to both. He must in all respects conform to the terms of the deed, and where discretion is vested in him he should exercise it prudently and fairly.* Also, *Advertisement, No general rule can be laid down as to the length of time property should be advertised for sale. Ordinarily, a direction to "duly advertise" is sufficiently complied with by advertising in*

accordance with the prevailing custom adopted by prudent men in the management of their own affairs, or by following the rule of courts in relation to sales of like property in the jurisdiction in which the property is situated. Moriss v. Virginia State Insurance Co, 90 Va. 370, 18 S. E. 843.

Shmidheiser did not act prudently in his advertising decisions regarding the sale of Cerceo's commercial property.

II. The decision, per curiam, of the United States Court of Appeals, for the 4th Circuit, fails to address it's previous decision *in re Resolution Trust Corp. v. Maplewood Investments*, 31 F. 3d 1276(4th Circuit 1994).

The decision in this case is in conflict with the previous decision of the United States Court of Appeals for the Fourth Circuit in *Maplewood*. In *Maplewood*, conflict of interest of the trustee was asserted resulting in a price, which although low, was not proportionally as low as in the case petitioned herein.

The court below found for the Appellant-debtor, in *Maplewood*. The bank in the case petitioned herein, First Union Bank of Virginia, purchased a note already known to be in default, when purchased, and the purchasing bank was as in *Maplewood*, *not a holder in due course*. Va. Code Ann.§8.3A-302. **Holder in due course**. Pursuant to Va. Code Ann.§8.3A-305 (a)(2)**Defenses and claims in recoupment.**- conflict of interest is a statutorily provided defense against the holder, in addition to the defense under Virginia common law of the trustees requirement to be impartial to both debtor and creditor.

In oral argument before the United States Court of Appeals for the 4th Circuit, counsel for appellant in this matter, asserted that this case should be decided as *Maplewood* was decided because

they were the same in all essential aspects.

Further, Appellant's opening brief and reply brief, to the United States Court of Appeals for the 4th Circuit, both argued from the case in *Maplewood*.

The per curiam decision of the appeals court ignored any analysis of it's ruling in *Maplewood*. Appellants in this matter suggested in their petition for rehearing that a ruling in this matter be decided, *Stare decisis et non quieta movere*, in conformance with the ruling in *Maplewood*, in deciding the case.

CONCLUSION

For the foregoing reasons , the petition for writ of certiorari should be granted.

Respectfully submitted
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APPENDIX A

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

JOHN MICHAEL CERCEO; U.S. ROUTE 29, MADISON PROJECT, INCORPORATED
Plaintiffs-Appellants,

v. NO. 96-1781

WILLIAM E. SHMIDHEISER, III,
Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Virginia, at Charlottesville.
James H. Michael, Jr., Senior District Judge.
(CA-96-6-3-C, CK-95-680-6)

Argued: May 7, 1997

Decided: June 10, 1997

Before RUSSELL and HALL, Circuit Judges, and TRAXLER, United States District Judge for the District of South Carolina, sitting by designation.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Roy David Bradley, Madison, Virginia, for Appellants. Kevin Philip Oddo, FLIPPEN, DENSMORE, RUTHERFORD, & JESSEE, Roanoke, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

Appellants J. Michael Cerceo ("Cerceo") and U. S. Route 29, Madison Project Incorporated (" U. S. Route 29 ") (collectively "Appellants"), appeal the district court's conclusions that Appellee William E. Shmidheiser, III ("Shmidheiser"), as trustee under a deed of trust for U. S. Route 29, breached a fiduciary duty owed to U. S. Route 29 and inadequately advertised a foreclosure sale of real property mortgaged by U. S. Route 29. Like the bankruptcy and district courts, we conclude that Shmidheiser breached no fiduciary duty and properly conducted the foreclosure sale. Consequently, we affirm the judgement of the district court.

I.

In 1989, Cerceo and Walter Simonson ("Simonson") were shareholders of U. S. Route 29, which purchased 266 acres of real property ("the property") in Madison County, Virginia, by securing a $650,000 loan from Dominion Farm Loan Corporation ("DFLC"), the predecessor in interest to Dominion Bank ("Dominion Bank"). U. S. Route 29 borrowed an additional$250,000 from DFLC for working capital, and both loans were secured by first and second deeds of trust on the property in

favor of DFLC and by personal guarantees of Cerceo and Simonson.

By May 1992, U. S. Route 29 defaulted on the loans, thereby prompting Dominion Bank to mediate an agreement by which Cerceo and Simonson would divide the property. Under Dominion Bank's tutelage, Simonson acquired 170 acres of the property by satisfying half of the debt to Dominion Bank and abjuring his interest in U. S. Route 29 in favor of Cerceo. For his part, Cerceo paid Dominion Bank an additional $78,000 and executed a promissory note in favor of Dominion Bank for $400,000 subject to the two deeds of trust. This promissory note was secured by a lien on production inventory of Cerceo's winery, Misty Mountain Vineyards ("Misty Mountain"), which had executed a deed of trust on it's real property in favor of Second Bank and Trust of Culpeper ("Second Bank") in exchange for a $465,000 loan. U. S. Route 29, through Cerceo, retained the remaining 91 acres of the property, which was zoned for commercial use.

The year 1992 was not a banner year for Cerceo. By November 1992, Cerceo defaulted on the $400,000 promissory note executed in favor of Dominion Bank; subsequently, Misty Mountain defaulted on the $465,000 loan from Second Bank and thereafter filed a bankruptcy petition, thereby frustrating Second Bank's attempt to foreclose on the winery realty. Thus Cerceo, U. S. Route 29, and Misty Mountain were in financial straits.

During Misty Mountain's bankruptcy proceeding, First Union National Bank of Virginia ("First Union") purchased the $400,000 promissory note that Cerceo executed in favor of Dominion Bank; moreover, First Union attempted to enforce the rights under the promissory note by intervening in Misty Mountain's bankruptcy proceeding to prohibit Misty Mountain from applying

the proceeds of the sale of it's inventory to satisfy any other creditors other than First Union. Attempting to salvage Misty Mountain's failing fortunes, Cerceo successfully negotiated for the use of Misty Mountain's cash collateral in exchange for granting First Union a junior lien on the winery realty. Thereafter, Shmidheiser, while counsel for First Union, was appointed trustee on the U. S. 29 deeds of trust.

Recognizing that the only hope of remaining financially afloat was to sell the realty U. S. 29 and Misty Mountain held, Cerceo was elated to discover that Disney, Incorporated, entertained ideas of developing an amusement park near the 91-acre parcel and the winery property. Unfortunately, however, Disney abandoned its schemes; consequently, the value of the properties plummeted. Seeking to enforce their rights as creditors, First Union and Second Bank attempted to foreclose on both parcels of realty. As junior lienor, First Union proposed an aggressive marketing strategy that would foment interest in the winery, gain momentum, and culminate in a handsome sale price. Likewise, Cerceo shared this sentiment in an effort to salvage his failing business and avoid, if possible, any deficiency judgement. In this connection, Cerceo hired marketing consultants Woltz & Associates ("Woltz") to plan a sales strategy. Accordingly, First Union and Cerceo sought a delay in foreclosure. Conversely, as senior creditor that would likely be wholly satisfied, Second Bank contemplated a quick sale without resorting to protracted marketing strategies.

According to Cerceo, on February 20, 1995, one week prior to the foreclosure sale of the winery property, First Union advised him that if U. S. Route 29 would avoid filing bankruptcy, which would interfere with First Union's liquidation plans for the 91-acre parcel, First union would seek to enjoin Second Bank's foreclosure sale. Taken with the proposal, Cerceo agreed, provided that First union would engage Woltz to sell not only the winery property, but

also the 91-acre parcel. First Union proved amenable to this scheme, so joining forces, Cerceo and First Union successfully moved the bankruptcy court to enjoin Second Bank's foreclosure sale of the winery property.

Despite their plans, First Union subsequently advised Cerceo that Shmidheiser dispensed with Woltz and elected to conduct the foreclosure sale of the 91-acre parcel himself. Accordingly, Shmidheiser advertised the sale of that parcel each week for four consecutive weeks in *The Madison County Eagle*, a local newspaper of general circulation. Responding to the advertisement, a handful of putative purchasers appeared for the foreclosure sale, and the parcel was sold for $250,000.

Galled by this turn of events, U. S. Route 29 filed a bankruptcy petition in April 1995, and in May of that year, Shmidheiser filed a suit in state court seeking a deficiency judgement in an amount representing the difference between the $250,000 sale price and the balance on the $400,000 promissory note. Shmidheiser's suit prompted Cerceo to file suit in state court against Shmidheiser, asserting a claim of breach of fiduciary duty. Cerceo's state suit was removed to the bankruptcy court, and after the parties stipulated to certain facts, the bankruptcy court tried the issues of the breach of fiduciary duty, the propriety of the foreclosure sale, and the sale price of the realty. Shmidheiser prevailed in the bankruptcy court. Specifically, the bankruptcy court concluded that Shmidheiser breached no fiduciary duty. See Va. Code Ann. § 26-58 (Michie 1995). Also, the bankruptcy court held that Shmidheiser complied with Virginia law regarding advertisement of the foreclosure sale, *see* Va. Code Ann. § 55-92.A2 (Michie 1995), and finally that the sales price was not so outrageously deficient as to shock the judicial conscience.

The Appellants appealed to the district court only the issues

of the propriety of the foreclosure sale and the breach of fiduciary duty. The district court affirmed, holding that Shmidheiser breached no fiduciary duty and properly conducted the foreclosure sale. Unsuccessful in the district court, the Appellants appeal to us, challenging these two conclusions and attempting to assert a variety of contentions that were never raised in the bankruptcy or district courts or were not preserved for appeal to or from the district court.

II

We first state our standard of review. After stipulating to certain facts, the parties tried the case to the bankruptcy court. In such a procedural posture, we review the bankruptcy court's method of fact finding for clear error, but we exercise plenary review over it's legal conclusions. *See In re Morris Communications NC, Inc.*, 914 F.2d 458, 467 (4th Cir. 1990). The Appellants' persuading us that the bankruptcy court erred is a weighty burden indeed because "[i]n reviewing factual findings, our scope of review is particularly circumscribed, being limited to determining whether the facts as found by the [trial] court are clearly erroneous. "*See Jiminez v. Mary Washington College*, 57 F.3d 369, 378 (4th Cir.), *cert. denied*, 116 S. Ct. 380 (1995). Thus, "[f]acts are conclusive on appeal...unless they are plainly wrong." *Id.* Precedent prohibits our substituting our judgement for that of the bankruptcy court, and the force of this precept precludes reversal here unless we are left with the definite and firm conviction that a mistake has been committed.'" *Id.* (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948). Of course, as an appellate court, we are not so bound with respect to the bankruptcy court's legal conclusions, but may freely review them. *See In re Tudor Assocs. II*, 20 F.3d 115, 119 (4th Cir. 1994). Guided by this procedural standard, we address the Appellants contentions.

A.

We quickly dispatch the Appellants' initial challenges to the district court's judgement. The Appellants attempt to assert here numerous challenges that were not raised in the bankruptcy or district courts or were not preserved for appeal from either of the lower courts. Absent plain error, *see Singer v. Dungan*, 45 F.3d 823, 827-28 (4th Cir. 1995), exceptional circumstances, *see United States v. One 1971 Mercedes Benz*, 542 F.2d 912, 915 (4th Cir. 1976), or a fundamental miscarriage of justice, *see Bakker v. Grutman*, 942 F.2d 236, 242 (4th Cir. 1991), we shall not address issues raised for the first time on appeal, *see Singleton v. Wulff*, 428 U.S. 106, 120 (1976). We have repeatedly adhered to this precept. *See, e.g., Estate of Altobelli v. International Business Mach. Corp.*, 77 F.3d 78, 81 n*(4th Cir. 1996)(declining to consider if a divorce decree was a qualified domestic relations order under ERISA because the issue was not raised in the district court); *Hughs v. Bedsole*, 48 F.3d 1376, 1388 n.14 (4th Cir.1995)(declining to consider a discrimination claim because it was raised for the first time on appeal), *cert. denied*, 116 S. Ct. 190 (1995). Similarly, reviewing courts decline to address issues raised in the trial proceedings, but not preserved for appeal. *See One 1971 Mercedes Benz*, 542 F.2d at 915. Again, precedent counsels us to decline to review such challenges. *See, e.g., United States v. Borden*, 10 F.3d 1058, 1063(4th Cir. 1993) (refusing to consider the validity of an indictment on appeal because the issue was not properly preserved for appeal); *Buffington v. Baltimore County, Md.*, 913 F.2d 113, 121 (4th Cir. 1990)(explaining that the applicability of the defense of qualified immunity would not be considered on appeal for want of proper preservation in the district court); *see also Hagan v. McNallen (In re McNallen)*, 62 F.3d 619, 625 (4th Cir. 1995)(explaining in connection with a bankruptcy discharge proceeding that appellate courts will not entertain claims if they are procedurally defaulted). Application of these principles

compels us to decline considering the Appellants' numerous arguments that were either not raised initially or preserved for appeal. Thus we proceed to analyze the breach of fiduciary duty and the adequacy of the advertisement of the foreclosure sale.

B.

Observing that Shmidheiser is counsel for First Union and trustee under the deeds of trust, the Appellants posit that he breached his duty to act as a fiduciary for both First Union and U. S. Route 29. According to the Appellants, Shmidheiser can be either counsel to First Union or trustee under the deeds of trust, but he cannot serve in both capacities without violating his fiduciary duty. We conclude that Virginia statutory law forecloses this position.

Virginia law provides that a trustee under a deed of trust is a fiduciary for both the debtor and the creditor, and in this dual capacity, the trustee must act impartially respecting these two competing interests. *See Whitlow v. Mountain Trust Bank*, 207 S.E. 2d 837, 840(Va. 1974). As a corollary, "a trustee must refrain from placing himself in a position where his personal interest conflicts with the interest of those for whom he acts as fiduciary." *Id.* Thus, Shmidheiser must act impartially regarding First Union and the Appellants. Virginia law provides further, however, in relevant part, that:

> The mere fact that a trustee in a deed of trust to secure a debt due to a corporation is a stockholder, member, employee, officer or director of, or counsel to, the corporation, does not disqualify him from exercising the powers conferred by the trust deed nor does it render voidable a sale by such trustee in exercise of the powers conferred on him by the trust deed so long as he did not

> participate in the corporation's decision as to the amount to be bid at the sale of the trust property....

Va. Code Ann. §.26-58 (Michie 1995). Section 26-58, therefore, expressly contemplates that a trustee under a deed of trust may serve in the dual capacity as Shmidheiser served here, provided that Shmidheiser did not participate in the formulation of the bid at the foreclosure sale, and the record in this case supports no such inference; this conclusion is even more salient because First Union was not the successful purchaser at the foreclosure sale. Accordingly, we conclude that Shmidheiser breached no fiduciary duty owed to the Appellants given that section 26-58 explicitly provides that counsel for a creditor corporation may serve as a trustee under a deed of trust and that a foreclosure sale under such circumstances is valid unless the trustee participates in formulating the foreclosure sale bid.

C.

The Appellants next contend that Shmidheiser improperly conducted the foreclosure sale. The gravamen of this contention is that Shmidheiser's advertising the foreclosure sale was inadequate because he only advertised the sale in *The Madison Eagle*, the local newspaper, rather than a newspaper of greater circulation such as *The Richmond Times-Dispatch* or *The Washington Post*. Again we find that Virginia statutory law and our own precedent belie this argument.

Respecting the advertising of foreclosure sales, Virginia law provides in relevant part:

> Advertisement of sale by a trustee or trustees in execution of a deed of trust shall be in a newspaper having a general circulation in the city or county wherein the property to be

> sold, or any portion thereof, lies....
>
> ....
>
> If the deed of trust does not provide for the number of publications of such newspaper advertisement, the trustee shall advertise once a week for four successive weeks....

Va. Code Ann. §55-59.2A2 (Michie 1995). In the instant suit, the deed of trust did not prescribe the method of advertising, so, relying on section 55-59.2A2, Shmidheiser advertised the foreclosure sale once per week for four consecutive weeks in the local newspaper, as the statute mandates. Accordingly, Shmidheiser followed the letter of the law, and he cannot be faulted for his strict compliance. In addition, circuit precedent eschews the very contention that the Appellants advance. In *Kriesel v. Berkshire Associates*, 452 F.2d 491 (4th Cir. 1971), we explained that a trustee under a Virginia deed of trust need do no more than fulfill his statutory obligations with regard to advertising a foreclosure sale:

> [The trustee] did all by way of the place, manner and duration of advertising and all other steps to effect the sale that the Virginia law requires of a trustee. [The debtors's] argument is simply that [the trustee] should have done more in the way of advertising....We think the argument manifestly lacking in merit... there is simply no evidence that the property was not properly advertised and sold at a properly conducted sale.

Id. at 493. Having complied with the statutory provisions regarding advertising, we conclude that Shmidheiser properly conducted the foreclosure sale.

III.

We decline to address matters being raised for the first instance on appeal or not properly preserved for appeal, and thus, the Appellants' challenges that attempt to circumvent these rules are not considered. Regarding the breach of fiduciary duty claim, we hold that Shmidheiser breached no fiduciary duty; rather, he acted in accordance with Virginia law. Similarly, with respect to the propriety of advertising the foreclosure sale, we hold that Shmidheiser properly advertised the foreclosure sale; hence, need do no more. The judgement of the district court is, therefore, affirmed.[4]

AFFIRMED

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[4]Shmidheiser moved to strike portions of the Joint Appendix from consideration. This issue was not advanced at oral argument, and given our disposition, the motion is largely irrelevant. Regardless, we deny the motion.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
July 9, 1997

No. 96-1781
CA-96-6-3-C
BK-95-680-6

JOHN MICHAEL CERCEO; U.S. ROUTE 29, MADISON PROJECT

Plaintiffs - Appellants

v.

WILLIAM E. SHMIDHEISER, III

Defendant - Appellee

On Petition for Rehearing with Suggestion for Rehearing In Banc

---

The Appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for

rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Patricia S. Connor

CLERK

Supreme Court, U.S.
FILED
OCT 7 1997
CLERK

(2)

No.97-624

In The
Supreme Court of the United States
October Term, 1997

JOHN MICHAEL CERCEO; U. S. ROUTE 29,
MADISON PROJECT, INCORPORATED,
Petitioners,

v.

WILLIAM E. SHMIDHEISER, III,
Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

APPENDICES: C, D, & E

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APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

J.MICHAEL CERCEO, ET AL Appellants,	)	
	)	CIVIL ACTION
	)	NO. 96-00006-C
v.	)	ORDER
WILLIAM E. SHMIDHEISER, III Appellee.	)	
	)	JUDGE JAMES H.MICHAEL, JR.

For the reasons stated in the accompanying Memorandum opinion, it is this day

ADJUDGED AND ORDERED

that the judgement of the Honorable William E. Anderson, Judge, United States Bankruptcy Court for the Western District of Virginia, Lynchburg Division, shall be and it hereby is, *AFFIRMED.*

The adversary proceeding, Civil Action Numbered 96-00006-C, shall be, and it hereby is, stricken from the active docket of this court.

The Clerk of the Court is hereby directed to send a certified copy of this Order to all counsel of record and to the Honorable William E. Anderson, Judge, United States Bankruptcy Court for the Western District of Virginia, Lynchburg Division.

ENTERED: \s\ *James H. Michael, Jr.*

Senior United States District Judge

April 30, 1996

Date

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

J. MICHAEL CERCEO, ET AL	)	CIVIL ACTION NO.
	)	96-00006-C
Appellants,	)	
	)	
v.	)	MEMORANDUM
	)	OPINION
WILLIAM E. SHMIDHEISER, III	)	
	)	
Appellee.	)	JUDGE JAMES H.
	)	MICHAEL, JR.

This matter comes before the court upon the appeal of an Order of the United States Bankruptcy Court for the Western District of Virginia, Lynchburg Division, Judge William E. Anderson, holding that the appellants were not entitled to have a prior foreclosure sale set aside because(1) the trustee did not breach any fiduciary duty owed to the appellants, (2) the appellants did not carry their burden of demonstrating that the price obtained at the foreclosure sale was so inadequate as to shock the conscience;[1] and (3) the

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[1]It does not appear to the court that the appellants assign error to the bankruptcy court's conclusion that the sale price does not shock the conscience. Rather, the appellants argue that the sale price was not the highest and best price possible and

appellants did not carry their burden of demonstrating that the trustee under a deed of trust did not properly advertise the foreclosure sale. For the reasons set forth below, the court will affirm the decision of the bankruptcy court.

I.

The appellant, J. Michael Cerceo ("Cerceo"),is a shareholder and officer of the corporate appellant, U. S. Rt. 29, Madison Project, Inc. ("U. S. Rt. 29").[2] U. S. Rt. 29 purchased a tract of land comprised of 266 acres and located in Madison County, Virginia. The purchase price of the property, $650,000.00, was lent to U. S. Rt. 29 by the predecessor to First Union National Bank of Virginia("First Union"),[3] and was secured by a deed of trust. The appellee, William E. Shmidheiser, III("Shmidheiser"), was appointed as substitute trustee under the deed of trust.[4] The purchase price was further secured by the personal guarantees of Cerceo and Walter Simonson ("Simonson"), another shareholder of U. S. Rt. 29.

In May 1992, Cerceo and Simonson divided the 266

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that the highest and best price was not achieved because the trustee failed to properly advertise the foreclosure sale.

[2] U. S. Route 29 is currently a debtor in bankruptcy, pursuant to Chapter 7 of the Bankruptcy Code, 11 U.S.C.§§ 701 et seq. (1996).

[3] The predecessor to First Union was Dominion Farm Loan Corporation.

[4] Mr. Shmidheiser was not the original trustee. In 1994, First Union removed the original trustees and replaced them with Mr. Shmidheiser as the sole substitute trustee.

acre tract. Simonson acquired 175 acres and paid off one-half of the existing bank loan. U. S. Rt.29 retained the remaining ninety-one acres. Cerceo caused another corporation controlled by him, Misty Mountain Vineyard ("Misty Mountain"), to grant First Union a lien on equipment owned by Misty Mountain as additional security on the U. S. Rt. 29's debt. In November 1992, U. S. Rt. 29 defaulted on its obligation to First Union.

In July 1993, Misty Mountain filed for protection pursuant to the bankruptcy law. First Union filed a motion for relief from the stay in Misty Mountain's bankruptcy case and sought to foreclose on the security. Misty Mountain argued to the bankruptcy court that First Union should look first to U. S. Rt. 29 for payment because the real property primarily secured the debt of U. S. Rt. 29. Cerceo further represented to the bankruptcy court that the real property would be sold at auction in September 1994. The bankruptcy court accordingly denied First Union's motion.

The auction took place on October 14, 1994. Notwithstanding considerable advertising of the scheduled auction, no one bid on the property. Cerceo requested, and First Union granted, additional time until the end of 1994 to sell the property. Cerceo did not succeed in selling the property by the end of 1994.

In January 1995, First Union advised Cerceo that it was going to foreclose on the property. Shmidheiser advertised the sale once per week for four weeks in the Madison County Eagle. In addition, Shmidheiser mailed packets of information to at least thirty-five prospective purchasers who had expressed interest before the 1994 auction. Shmidheiser conducted the foreclosure sale on March 11, 1995. Approximately twenty people attended the sale with four people bidding. The property was sold for $250,000.

Cerceo and U. S. Rt. 29 initiated an adversary proceeding against Shmidheiser claiming that the Trustee breached his fiduciary duty owed to the debtor because Shmidheiser represented First Union in other legal matters, including an action prosecuted by First Union and against Cerceo. Furthermore, the appellants claim that Shmidheiser failed to advertise the foreclosure sale of the real property effectively and failed therefore to achieve the highest and best price. The bankruptcy court rejected the appellant's arguments and upheld the foreclosure sale. The appellants prosecute this appeal.

II

The district court reviews findings of fact by the bankruptcy court pursuant to a clearly erroneous standard and reviews the conclusions of law *de novo*, In re Tudor Assocs., Inc. II, 20 F.3d 115, 119(4th Cir. 1994); In re Morris Communications NC, Inc.,914 F. 2d 458, 467 (4th Cir. 1990); Lowes of Virginia, Inc. v. Thomas,60 B.R.418, 419 (W.D. Va. 1986).

The appellants argue first that Shmidheiser violated his duty to act as a fiduciary for both the owner and the lender. The appellants point to the fact that Shmidheiser is the sole substitute trustee and not independent of both the borrower and the lender. The appellants note that Shmidheiser and his law firm are counsel to First union and, in fact, are representing First Union on a suit on the subject loan against Cerceo in state court. The appellants argue that Shmidheiser can be either counsel to First Union or trustee under the deed of trust, but not both. Shmidheiser rejoins that pursuant to Virginia Code § 26-58, an attorney for the lender is entitled to act as the trustee under the deed of trust and that sales by such trustee are not voidable.

Virginia Code Ann. § 26-58 (Michie 1995) provides, in relevant part, that

> The mere fact that a trustee in a deed of trust to secure a debt due to a corporation is ...counsel to, the corporation, does not disqualify him from exercising the powers conferred by the trust deed no does it render voidable a sale by such trustee in the exercise of the powers conferred upon him by the trust deed so long as he did not participate in the corporation's decision as to the amount to be bid at the sale of the trust property.

In Resolution Trust Corp. v. Maplewood Investments, 31 F. 3d 1276(4th Cir.-1994), the court held that a question of a conflict of interest was presented where the trustee under a deed of trust was a subsidiary corporation of a parent corporation and certain officers of the parent corporation participated in the formulation of the parent corporation's bid and where the parent corporation was the sole prospective purchaser at the sale. See id. at 1282-83. In the instant case, the appellant makes no allegation that Shmidheiser participated in the formulation of the bid. The evidence reveals that the First Union did not purchase the real property and that Shmidheiser did not previously know or collude with the actual purchase of the property. The clear language of § 26-58 permits counsel of the creditor corporation to serve as a trustee in a deed of trust and provides that a sale under such an arrangement is not to be considered voidable unless the counsel/trustee participates in the corporation's decision as to the amount to be bid by the corporation at a foreclosure sale. The court concludes that the Virginia legislature arrived at such a structure only after a careful balancing of the interests of all potential parties to such a transaction.

Consequently, this court agrees with the bankruptcy court that the appellants failed to demonstrate that Shmidheiser breached any legal duty owed to the debtor, given the express statutory permission that counsel for a creditor corporation may serve as a trustee pursuant to a deed of trust and that a sale pursuant to such an arrangement will be considered valid unless the counsel/trustee participates in determining the amount that the creditor corporation will bid at the foreclosure sale.

Secondly, the appellants argue that Shmidheiser failed to effectively advertise the property and thus failed to achieve the highest and best price. The appellant relies upon Deep v. Rose, 364 S. E. 2d 228, 230(Va.1988), in which case the Virginia Supreme Court stated:

> Code § 55-59.2 evidences a strong legislative concern with the sufficiency of advertisements preceding foreclosure sales, with a purpose to insure a degree of publication that will generate sufficient interest to obtain the highest price available as well as to offer a reasonable time to redeem the debt.

Shmidheiser argues that a trustee has no duty to advertise beyond the requirements of Va. Code Ann. § 55-59.2(Michie 1995).[5] The bankruptcy court agreed with Shmidheiser, and this court will affirm the bankruptcy court's determination.

Section 55-59.2(A) provides, in relevant part, that the trustee shall advertise the sale "in a newspaper having a general circulation in the city or county wherein the property to be sold...lies...." Section 55-59.2(A)(2) provides, in

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[5] In oral argument before this court, counsel for appellants conceded that Shmidheiser fulfilled all the statutory requirements of a trustee in effecting a sale by foreclosure.

relevant part, that where the deed of trust does not provide for the number of publications, then the trustee "shall advertise once a week for four successive weeks...." Finally, § 55-59.2(C) provides, in relevant part, that the trustee "may give such additional advertisement as he may deem appropriate." In Kriesel v. Berkshire Assocs. Inc., 452 F.2d 491(4th Cir. 1971), the court rejected an argument that a trustee had failed to make a bona fide attempt to get the best price for a property sold at foreclosure. The Kriesel court noted that the trustee "did all by way of the place, manner and duration of advertising and all other steps to effect the sale that the Virginia law requires of a trustee." Id. at 493.

The appellants misplace their reliance upon Deep. In Deep, the deed of trust included a provision governing the requirement of and the procedures for advertisement before sale. In Deep, however, the trustee ran afoul of the requirement of §55-59.2 governing the earliest time that the sale may be held following the advertisement.[6] The factual circumstances of the Deep case differ widely from the factual circumstances of the instant case. In the instant case, Shmidheiser advertised one day per week for four weeks in the local newspaper having a general circulation in Madison County--the situs of the real property at issue. Shmidheiser conducted additional advertising by sending brochures to

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[6]The relevant portion of §55-59.1 provides that "[n]otwithstanding the provisions of the deed of trust, the sale shall be held on any day following the day of the last advertisement which is no earlier than eight days following the first advertisement nor more than thirty days following the last advertisement. " In Deep, the trustee had conducted the sale before the eighth day following the first advertisement.

interested prospective buyers. Shmidheiser testified before the bankruptcy court that he declined to advertise in additional newspapers because he believed that such efforts would not be cost effective--a private firm had conducted extensive advertising less than six months prior to the foreclosure sale and such extensive advertising had not produced a bid at the October 14, 1994 auction. Based upon a review of the evidence before the bankruptcy court, this court concluded that the bankruptcy judge did not err in concluding that appellants were not entitled to have the foreclosure sale set aside.[7]

III

For the reasons set forth, the court affirms the

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[7]The appellants seek to introduce evidence that the real property's appraised value is much higher than the price achieved at the sale. Shmidheiser argues that the appellants failed to introduce such evidence before the bankruptcy court and that, therefore, this court cannot now consider that evidence upon appeal. Obviously, Shmidheiser is correct. However, even if the court were to consider this additional evidence, the court would not necessarily conclude that Shmidheiser was required to advertise more broadly than he did. It is clear to this court that the Virginia legislature has determined how much advertising is necessary, and Shmidheiser followed those precise statutory requirements in addition to undertaking supplemental advertising in the form of distributing brochures to a targeted group of prospective purchasers. The rule from this case is clear: if debtors desire that a trustee conduct extensive advertising in the circumstance of a foreclosure sale, then the debtors should contract for such advertising when executing the deed of trust.

decision of the bankruptcy court. An appropriate order shall this day issue.

ENTERED:

\s\ James H. Michael, Jr.

Senior United States Judge

April 30, 1996

Date

APPENDIX E

UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

IN RE:	
U.S. ROUTE 29 MADISON PROJECT, INC.,	Chapter 11
Debtor.	Case No. 95-00680-WA3-7
J. MICHAEL CERCEO,	
and	
U.S. ROUTE 29, MADISON PROJECT, INCORPORATED, a Virginia corporation,	
Plaintiffs,	Adversary Proceeding No. 95-00046
v.	
WILLIAM E. SHMIDHEISER, III Trustee,	
Defendant	

FINAL ORDER

On the 20th day of October, 1995, came the parties, by counsel, and announced that they were ready for trial.

WHEREUPON, the Court having heard the evidence presented by the plaintiffs and by the defendants, and having considered the arguments of counsel, finds that (1) plaintiffs have not carried their burden of proving that defendant did not properly advertise the foreclosure sale at issue; (2) plaintiffs have not carried their burden of proving that the price obtained at the foreclosure sale was so inadequate as to shock the conscience; and (3) defendant did not breach any duties he owed to plaintiffs. Therefore, plaintiffs are not entitled to have the foreclosure sale set aside.

Accordingly, it is ADJUDGED, ORDERED and DECREED that judgement be, and it hereby is, entered in favor of defendant, and plaintiffs' Bill of Complaint is dismissed with prejudice.

The Clerk shall send a certified copy of this Order to the following persons:

Douglas E. Little, Esq.,
Musselman & Associates
413 7th Street, N. E.
P. O. Box 254
Charlottesville, Virginia 22902

Kevin P. Oddo, Esq.
Woods, Rogers & Hazlegrove, P.L.C.
First Union Tower, Suite 1400
10 South Jefferson Street

P. O. Box 14125
Roanoke, Virginia 24038-4125

W. Alan Smith, Jr., Trustee
Smith & Falcone
712 NationsBank Building
P. O. Box 957
Lynchburg, Virginia 24505

and the Clerk shall strike this adversary proceeding from the Court's docket.

ENTERED this 7th day of November, 1995.

\s\ William E. Anderson

United States Bankruptcy Judge

[8]

[8]Editors' Note: No memorandum opinion issued.

Supreme Court, U.S.
FILED
OCT 27 1997
CLERK

(3)

No. 97-624

In The

Supreme Court of the United States

October Term, 1997

JOHN MICHAEL CERCEO, *et al.*,

Petitioners,

vs.

WILLIAM E. SHMIDHEISER, III,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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5 pp

OPINIONS BELOW

The per curiam opinion of the court of appeals (Pet. App. 1 - App. 11) is unpublished, but the judgment is noted at 114 F.3d 1175 (Table). The opinions of the district court and of the bankruptcy court are unreported.

STATEMENT OF THE CASE

This action to set aside a foreclosure sale presents questions of state law — whether the respondent trustee advertised a foreclosure sale in accordance with a Virginia statute, and whether the trustee breached a fiduciary duty under Virginia law by simultaneously serving as trustee and as counsel for a creditor.

In March, 1995, J. Michael Cerceo and U.S. Rt. 29, Madison Project, Inc. (U.S. Rt. 29) filed suit against William E. Shmidheiser, III in the Circuit Court of Madison County, Virginia. After U.S. Rt. 29 filed bankruptcy, the case was removed to the United States Bankruptcy Court for the Western District of Virginia.

The gravamen of the complaint was that Shmidheiser, in his capacity as trustee under a deed of trust on property owned by U.S. Rt. 29, had not advertised a foreclosure sale of the property in accordance with Virginia law, and that as a result the property was sold for an inadequate price. In addition, plaintiffs alleged that Shmidheiser breached a fiduciary duty under Virginia law by serving as both trustee and as counsel for First Union, one of U.S. Rt. 29's creditors.

In October, 1996, the case was tried in the bankruptcy court, which ruled in favor of Shmidheiser on all issues. Petitioners appealed to the district court, which affirmed in a detailed memorandum opinion. The district court ruled that the petitioners had not properly preserved for appeal issues relating to the adequacy

of the price; that Shmidheiser advertised the foreclosure sale in the manner prescribed in Virginia Code § 55-59.2; and that Virginia Code § 26-58 permitted Shmidheiser to act simultaneously as trustee and as counsel for a creditor.

The United States Court of Appeals for the Fourth Circuit affirmed the rulings below. The court agreed that petitioners were precluded from asserting on appeal issues not raised in the bankruptcy or district courts, as well as issues not preserved for appeal from either of the lower courts. (Pet. App. 7). The court also agreed that the Virginia statutes at issue plainly did not support petitioners' claims of improper advertising and breach of fiduciary duty. (Pet. App. 8-10). The Petition for Certiorari followed.

REASONS FOR DENYING THE WRIT

The petition fails to present any compelling reasons to justify granting the writ. It is not asserted, nor could it be, that the decision of the court of appeals is in conflict with that of another court of appeals, or that an important federal constitutional or statutory question is at issue. Instead, the petition merely alleges that Virginia law was misapplied and that the factual findings made below were wrong. Review by this Court is not warranted under these circumstances.

1. Although couched in terms of Virginia "common law", the first question presented by petitioners is simply this: in Virginia, is a trustee under a deed of trust also permitted to act as counsel for a creditor of the grantor? The answer to this question is found in Virginia Code § 26-58, which provides as follows:

> The mere fact that a trustee in a deed of trust to secure a debt due to a corporation is . . . counsel to the corporation, does not disqualify him from exercising the powers conferred by the trust deed nor does it

> render voidable a sale by such trustee . . . so long as he did not participate in the corporation's decision as to the amount to be bid at the sale of the trust property.

Va. Code Ann. § 26-58 (1995).

The uncontradicted evidence at trial was that Shmidheiser did not participate in First Union's decision as to the amount to bid at the foreclosure sale. (J.A. 426).[1] In fact, First Union never even bid at the sale. Moreover, there was no evidence suggesting that Shmidheiser was partial to First Union in any way regarding the sale. These factual findings were not clearly erroneous, and the courts below properly held that there was no breach of fiduciary duty by Shmidheiser.

Petitioners' argument that they were not represented by counsel at the time of the sale is wrong. The record below is replete with communications between Shmidheiser and counsel for the petitioners during the months leading up to the sale. (J.A. 414). Counsel was informed at every stage of the process, and no objections were ever stated to Shmidheiser regarding any matter related to the sale. Indeed, petitioners admittedly were told weeks before the sale that the sale would be conducted by Shmidheiser (J.A. 27), but raised no objection until this litigation commenced. (J.A. 423).

Petitioners' suggestion that Shmidheiser breached his duty by not properly advertising the foreclosure sale has no merit. Under Virginia Code § 55-59.2, a trustee must advertise a foreclosure sale once a week for four successive weeks in a newspaper having a general circulation in the city or county wherein the property to be sold lies. The deed of trust contained the same requirement. It was conceded below by petitioners that Shmidheiser complied with

1. References to (J.A. __) are to the Joint Appendix in the Court of Appeals.

this requirement. (J.A. 355C). Under Virginia law, nothing more was required. *Kriesel v. Berkshire Assocs.*, 452 F.2d 491, 493 (4th Cir. 1971). Even if petitioners' argument was not foreclosed by statute, the evidence established that Shmidheiser conducted additional advertising beyond that contemplated by § 55-59.2 (J.A. 423-24), thereby satisfying any additional requirements sought by petitioners.

In sum, petitioners' disagreement with the result below regarding the breach of fiduciary duty and advertising issues is factbound and does not warrant further review.

2. Petitioners' assertion that the decision of the court of appeals conflicts with that in *Resolution Trust Corp. v. Maplewood Investments*, 31 F.3d 1276 (4th Cir. 1994), not only is wrong but presents issues which were never raised at trial or preserved for appeal from the bankruptcy court to the district court.

In *Resolution Trust Corp.*, the court held that a conflict of interest existed where the trustee participated in the formulation of the bid by the sole bidder at the foreclosure sale. *Id.* at 1282-83. As stated, such action violates Virginia Code § 26-58 and renders the sale voidable. There was no evidence of similar conduct by Shmidheiser; in fact, the evidence conclusively established the contrary. (J.A. 426).

Relying on *Resolution Trust Corp.*, petitioners advance a holder in due course argument under Virginia Code § 8.3A-302. This argument, like many others advanced in the court of appeals, was not made at trial or on appeal to the district court. Therefore, in accordance with well established principles, the court of appeals declined to consider it. (Pet. App. 7-8). *See United States v. One 1971 Mercedes Benz 2-Door Coupe*, 542 F.2d 912, 915 (4th Cir. 1976). This decision was a plainly correct application of settled law and need not be reviewed by this Court.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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